

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Pacific Gas and Electric Company

Docket No. ER01-1639-004

ORDER ON REMAND ESTABLISHING HEARING PROCEDURES

(Issued September 15, 2003)

1. This case is before the Commission on remand from a decision of the United States Court of Appeals for the District of Columbia Circuit,¹ for further consideration of whether Pacific Gas and Electric Company (PG&E) met a joint review requirement under a contract with the Western Area Power Administration (Western) before it filed new transmission rates. As discussed below, the Commission remands the case to the administrative law judge (ALJ) that presided over the earlier hearing in this case.

BACKGROUND

2. Contract No. 14-06-200-2948A and particularly a related 1992 amendment (collectively, Contract 2948A) govern the interconnection of PG&E's and Western's transmission and distribution systems and the integration of their loads and resources. Contract 2948A allows Western to integrate PG&E's fossil-fuel fired generation with its own hydropower generation and deliver this "firmed" energy to preference customers – generally government and municipal entities – pursuant to Federal reclamation law. In return, PG&E receives access to surplus hydro generation, which historically has been less expensive than PG&E's fossil fuel-fired generation.

3. On March 29, 2001, PG&E sought Commission approval to amend Contract 2948A to recover additional costs associated with energy purchases and scheduling coordinator obligations and to update base transmission rates to reflect current PG&E revenue requirements. Unable to determine whether Contract 2948A limited PG&E's rights under Section 205 of the Federal Power Act, 16 U.S.C. § 824d (2000), to make

¹ Pacific Gas & Electric Co. v. FERC, 326 F.3d 243 (D.C. Cir. 2003).

such a filing, the Commission conditionally accepted PG&E's amendments and made them effective, subject to refund, and set the filing for hearing.²

4. The ALJ's Initial Decision determined that PG&E lacked the contractual right to make a Section 205 filing under its agreement with Western and the Section 205 filing made by PG&E exceeded the Section 205 rights granted in the applicable provisions of Contract 2948A.³ The Commission affirmed the Initial Decision.⁴

COURT REMAND

5. On appeal, the court affirmed the Commission's determination that Contract 2948A precluded PG&E from using Section 205 to change its energy rates in this instance. Regarding the transmission rates, the court remanded for further consideration the issue of whether PG&E met the condition precedent for proposing changes in its transmission rate.

6. The court stated that the joint review requirement in Article 32 of Contract 2948A⁵ was a condition precedent on PG&E's ability to amend its transmission rates under Section 205. The court next examined whether the Commission had identified the appropriate standard for compliance. In the Initial Decision, the ALJ rejected "substantial compliance" in favor of strict compliance as the operative standard for determining whether PG&E complied with the condition precedent. The court disagreed, noting that substantial compliance is appropriate since, without the flexibility afforded by this standard, a "minor defect in compliance could trigger wholly disproportionate consequences with little warning, perhaps engendering wasteful overcompliance

² Pacific Gas & Electric Co., 95 FERC ¶ 61,273, reh'g denied, 96 FERC ¶ 61,102 (2001).

³ Pacific Gas & Electric Co., 96 FERC ¶ 63,043 (2001).

⁴ Pacific Gas & Electric Co., 97 FERC ¶ 61,082, reh'g denied, 97 FERC ¶ 61,335 (2001).

⁵ Article 32 sets forth the joint review requirement:

Rates and charges . . . shall . . . together with service charges, be jointly reviewed, and adjusted as appropriate . . . every five years Such review shall take into account substantial savings accruing to either party and applicable costs of construction and production, including changes therein and appropriate service charges, during the preceding five years. If the parties are unable to agree on a change of any rate or charge, the matter shall be submitted to [the Commission] for final decision.

efforts.”⁶ (PG&E had argued that the five years of data required for joint review were presented in the rate cases in which PG&E had to submit this information, and that Western had access to that data since it was a party to those proceedings.)

7. Having concluded that a different standard was appropriate, the court was left without a conclusion by the ALJ or the Commission that applied the facts to this standard. According to the court, meeting the substantial compliance standard for joint review requires, essentially, three showings: (1) the information required under Article 32 should be made available to Western; (2) Western must have a chance to ask questions and raise concerns, to which PG&E must respond “clearly, forthrightly and completely”; and (3) if Western expresses a reasonable desire to meet and discuss open questions, PG&E must cooperate.⁷

8. The court asks two questions. The first is whether Western met its “disclosure” obligation; that is, did PG&E give Western “reasonably convenient access” to the data required under article 32 of the contract.⁸ If the Commission uses this basis for concluding that PG&E failed to substantially comply with its joint review requirement, the court explains, it should clarify what information has not been made available.

9. The second question alternatively goes to PG&E’s performance of its joint review obligation. The court notes that PG&E rebuffed a request from Western to meet and discuss cost of service data, but it was unclear to the court whether the ALJ would have concluded that this alone was sufficient to conclude that PG&E had failed to comply with its joint review obligation.

RESPONSIVE PLEADINGS

10. On June 3, 2003, PG&E submitted a recommendation regarding remand procedures. It recommends that the Commission refer the unresolved issues to an ALJ for hearing and the development of a record. Northern California Power Agency (NCPA) responded to PG&E’s request, asking that the Commission direct the remand proceedings to the same ALJ that issued the Initial Decision earlier in this proceeding.

⁶ Pacific Gas & Electric Co. v. FERC, 326 F.3d at 251.

⁷ Id. at 252.

⁸ The Court explained that access to the necessary data, and not the delivery of such data, was the appropriate measure of substantial compliance. Id. at 251.

DISCUSSION

11. The Commission will remand to the same ALJ who presided in the earlier hearing and issued the Initial Decision for further hearing whether PG&E met its joint review obligation under Contract 2948A. The hearing should consider whether PG&E provided Western “reasonably convenient access” to the information required by Article 32, and, if so, whether PG&E’s actions were sufficient to conclude that it substantially complied with its joint review obligation.

12. While the Commission is setting this case for hearing, we urge the parties to make every effort to consensually resolve this dispute. In this regard, we encourage the parties to consider using trial staff to facilitate a consensual outcome, a settlement judge or a mediator, or other Alternative Dispute Resolution options such as the Commission’s Dispute Resolution Service.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly Sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held to resolve the remaining issues in this proceeding, as discussed in the body of this order.

(B) The presiding administrative law judge previously designated by the Chief Administrative Law Judge shall convene a prehearing conference in this proceeding to be held within approximately 15 days from the date of issuance of this order, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. The presiding administrative law judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss), as provided in the Commission’s Rules of Practice and Procedure.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.